

Cameron's bid for irreversible guarantee means constitutional chaos

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The Conservative government's attempt to renegotiate the UK's terms of membership of the European Union continues to distress Britain's pro-Europeans, antagonise its anti-Europeans and bamboozle its EU partners.

Prime minister David Cameron has realised that there are two cardinal principles of EU primary law which he will not be allowed to breach: freedom of movement of EU citizens and no discrimination on the grounds of nationality. Moreover, hostilities against the European Court of Justice appear to have been suspended, at least for now. He has also learned that in order to change EU secondary law, namely in labour and welfare matters for migrants, he will need not only a qualified majority in the Council and the connivance of the European Commission but also the cooperation of the European Parliament. The latter, at least, is unlikely: Cameron has not even begun to butter up MEPs, and he is still unsure about whether to risk a personal appearance at a Strasbourg plenary. Who knows, he may even be starting to regret that he pulled his own Tory MEPs out of the European People's Party, Parliament's largest group.

Furthermore, it transpires that much of what the new Conservative government appears to want by way of EU 'reform' – such as a more dynamic trade policy, a push to competitiveness and better regulation – is work already well in hand under the auspices of President Juncker's Commission in any case, and will continue to be so whether or not the UK remains a member state of the Union.

Investigation of the possibility of asking for more opt-outs for the UK has led nowhere, especially after the coalition government's recent review of EU competences threw up no suggestions for repatriation. Indeed, taking into account the UK's self-exclusion from the euro and the banking union, its non-membership of the Schengen area, its multiple choice opt-outs from common justice and home affairs policies, its claimed dispensation from the Charter and, not least, its precious budgetary rebate, Britain is already as semi-detached a state as any member state could be.

Difficulties mount at home and abroad

On the domestic front, the party conference season has shown that Cameron cannot expect the 'pro-European' opposition forces of Labour, the Liberal Democrats, SNP or Greens to weigh in cosily behind a partisan Tory renegotiation. Although the eurosceptic new Labour leader Jeremy Corbyn admits he may vote to stay in the EU, neither he nor the trade unions will campaign for a Tory package deal which weakens the social dimension of the single market. The more Cameron vaunts a triumphant outcome of his valiant 'renegotiation' the less likely it is that a grand cross-party coalition of 'In' forces will materialise. As things stand, it looks as though the prime minister will be fighting a fairly lonely referendum campaign with the backing of some but by no means all representatives of business and the City of London – and with his own government and party split asunder.

Belated recognition of these apparently unforeseen difficulties has forced Cameron to delay presenting his EU partners with a substantial catalogue of explicit demands. Instead, he and his team are going about Europe talking of 'baskets' of issues such as transparency, vetoes for national parliaments and reserve powers for non-eurozone states to block the eurozone majority: no texts have yet been tabled. The result is that nobody quite knows what the British are doing. London's vague and often conflicting messages are mystifying. Cameron continues to criticise the EU for being 'too big, too bossy, too interfering'. Hyperbolic attacks on 'Brussels' by Tory ministers, MPs and MEPs are unlikely to win friends or influence people in a good way. At the EU institutions, indeed, other important matters are more pressing than Brexit.

Reversing ever closer union

Amid this general British grumpiness there is the very specific demand to extricate the UK from the historic

mission of the Union to 'ever closer union among the peoples of Europe'. This issue is not merely of marginal significance, as is often alleged by pro-Europeans who should know better. The phrase has always appeared in the preambles of successive European treaties, but was upgraded in the Maastricht treaty (signed by Cameron's predecessor as Tory prime minister, John Major) and given pride of place in Article 1 of the Treaty on European Union. The British demand to remove or amend the phrase is highly significant, and would certainly constitute what Foreign Secretary Philip Hammond calls a 'genuine, irreversible change' in the direction of the Union. His Minister of Europe David Lidington equally insists on such a 'clearly irreversible and legally binding' change.

There is no precedent in the history of the EU of a member state ripping up its existing treaty obligations. It is true that both Denmark and Ireland were granted special Council decisions and (non-binding) declarations in the effort to overcome negative referendum votes on the Treaties of Maastricht, Nice or Lisbon. But these were concessions designed to permit treaties that had already been signed by every head of government to enter into force. The supplementary agreements were mainly of a tautological or oxymoronic nature – affirming that the treaties meant in fact what they said – although some took the form of promised future additions to treaty texts. (A similar agreement after the signing of the Lisbon treaty was made with the Czech Republic concerning the Charter of Fundamental Rights but was never delivered.) It is important to note, however, that none of those special measures amounted to new opt-outs; none made any substantive change to the treaties as agreed; and all were crafted, with a mixture of high politics and low cunning, to accomplish a successful ratification of a treaty change which deepened the integration of Europe.

By contrast, the current British demand for an irreversible legal guarantee on weakening integration is a very different thing. The chances of getting agreement on a dismantling of 'ever closer union' are slim indeed. But even were a political agreement reached, because political promises can be and are broken, a legal guarantee to amend Article 1 could not come in the form of a mere promissory note. A political promise made to Cameron by other heads of government that implied a future rupture with the UK's previous treaty commitments – even if it were dressed up as a Council decision – would be unlikely to survive a challenge at the Court of Justice. And in any case the European Council cannot legally commit a future intergovernmental conference into amending the treaties on such a fundamental issue as the very mission of the Union, not least because such a treaty revision would have to run the gauntlet of an open constitutional Convention populated by national and European parliamentarians.

It is therefore a paradox that just as the British appear to be rowing back on wider demands for substantive policy reform in Europe, they are ratcheting up their insistence on the legal form of one particularly controversial outcome to the renegotiation. One may wonder what they hope to achieve with this.

No escaping treaty change

The British provocation aimed at changing the *finalité politique* of the European Union cannot simply be dealt with by a paragraph in the conclusions of a European Council meeting, as it was unfortunately in June last year when, faced with Cameron's rage over the election of Jean-Claude Juncker, it was stated that '*the concept of ever closer union allows for different paths of integration for different countries*'. For what the British are now asking for in constitutional terms is massive: not just differentiated speeds towards the same destination, but an 'irreversible', no way back commitment to a different destination entirely.

To be fair to David Cameron, he has been talking for ages about the need for treaty change. He must now accept that the next general revision of the treaties will not begin until after 2017 when the French and German elections and the British referendum are out of the way. So the temptation now looms to go for a limited bilateral treaty between the UK and the EU to 'resolve the relationship', as Hammond puts it.

Yet this is another false trail. Such a new treaty would have to amend the UK's treaty of accession to the European Community which was signed by the then Conservative prime minister Edward Heath on 22 January 1972. The preamble to that treaty says its signatories were '*united in their desire to pursue the attainment of the objectives*' of the Treaties, and '*determined in the spirit of those Treaties to construct an ever closer union among the peoples of Europe on the foundation already laid*'. That statement, incidentally, rather gives the lie to those British eurosceptics like David Cameron who pretend that the decision to join the EEC was about a common

market only. But it suddenly carries greater weight as one of Heath's Tory successors seeks to remove it.

Article 6 of the Act attached to the accession treaty says:

The provisions of this Act may not, unless otherwise provided herein, be suspended, amended or repealed other than by means of the procedure laid down in the original Treaties enabling those Treaties to be revised.

So short cuts are ruled out. Today, the relevant revision procedure is found in Article 48 TEU which lays down that an amendment to or derogation from Article 1 would require all the works: a constitutional Convention (if the European Parliament so insisted, as it would), followed by unanimous agreement between and ratification by all twenty-eight member states of the Union according to their own constitutional requirements (which in many cases means referenda).

No EU state has ever before sought to overthrow its membership commitments. The only exception, of limited relevance, was in 1985 when Greenland chose to be relegated from full EU membership because of its changed constitutional relationship with the Kingdom of Denmark. Greenland now enjoys associate status as one of the EU's many 'overseas countries and territories', along with Pitcairn and the Cayman Islands.

Try as they might, the cleverest EU lawyers will find no route to satiate the British desire for an irreversible, legal guarantee that would change the nature of the European project. The likelihood increases, therefore, that the Brexit renegotiation is doomed to fail and that the referendum results in a vote to leave the EU. Once that happens we are plunged into Article 50 territory and complicated secession negotiations lasting about two years. The end product will be a 'withdrawal agreement' in the form of a bilateral treaty between the UK and the EU. It will be negotiated by the Commission and concluded by the Council, acting by qualified majority without the British, after obtaining the consent of the European Parliament. If treated with care, that new treaty might possibly comprise a package deal to craft a new form of affiliate membership of the Union that might suit the UK as well as other determinedly anti-federalist, non-eurozone states. Once the full facts are known, a second referendum should not be ruled out.

For the moment, however, Europe's British problem is getting distinctly worse. The Conservative government is over-selling its 'renegotiation' and under-delivering. It poses acute political problems way beyond the capacity of eurocrats to resolve. Whatever its outcome, Britain's imminent referendum will weaken, not strengthen Parliament at Westminster; it will split the ruling party and divide the country. Worst of all, Cameron's clumsy and ill-judged Brexit risks returning Europe to chaotic disunity.

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